IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 955

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a corporation,

Petitioner,

vs.

JOSEPH DEL RASO, HORACE SYBERT, QUINTEN BENSON and LUDWIG DALPIAZ,

Respondents.

Petition for Certiorari to the Appellate Court of Illinois for the First Judicial District.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents' brief in opposition to the petition for certiorari warrants a specific reply to four suggestions advanced therein.

1. There should be no misapprehension about the issues which were resolved by the jury in this case. Contrary to the implication made at the outset of respondents' brief (Brief in Opposition, p. 1), the jury did *not* hold adversely

to petitioner on the issue of contributory negligence. The issue of contributory negligence was taken from the jury by a directed verdict. It was taken from the jury even though the evidence of the railroad's actual or constructive notice of a health hazard was substantially the same as the evidence which the jury should have been allowed to weigh in considering respondents' contributory negligence.

It is precisely this unequal application of the FELA directed verdict standard which provides the strongest of reasons for reversing the decisions below. There should be no double standard in the functioning of the jury under the FELA. This is a principle of genuine importance, and justifies the court's consideration of the case.

2. Assumption of risk is not involved in this case. Respondents' point I (Brief in Opposition, pp. 3-4) attempts to confuse the contributory negligence issue by injecting assumption of risk, wholly without foundation. Respondents' contention under point I is based on the incorrect assumption that facts which would be relevant to the defense of assumption of the risk (if one existed under the FELA) *cannot* be relevant to the defense of contributory negligence. That is not correct.

This court has held that conduct which may not be asserted as the defense of assumption of the risk may nevertheless be asserted as contributory negligence. The *Tiller* decision, from which respondents quoted selectively and incompletely (Brief in Opposition, p. 3), actually held not only that Tiller's alleged fault was unavailable for the defense of assumption of the risk but also that under the 1939 FELA Amendments Tiller's alleged fault *was* available for the defense of contributory negligence:

> "We think that the question of negligence on the part of the railroad *and on the part of the employee* should have been submitted to the jury." 318 U.S. 54, 68, emphasis added.

The legislative history reviewed in Justice Black's opinion confirms that an employee's fault, which previously had been a complete bar to recovery as assumption of the risk, would continue to be weighed by the jury as comparative contributory negligence (318 U.S. 54, 65):

> "'The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned.'"

The *Howard* decision, quoted with respect to assumption of the risk by respondents (Brief in Opposition, pp. 3-4), also was an FELA case where contributory negligence *was submitted* to the jury.

The rule of decision in FELA cases is consistent with the basic rule of tort law. Section 496A, comment d, of the Restatement of Torts, Second, quoted in the dissent below (Petition, p. 37a), observes: "The same conduct on the part of the plaintiff may thus amount to both assumption of risk and contributory negligence . . ." Prosser on Torts makes the same point in section 55.

3. If it proves anything, respondents' recitation of the circumstances supposed to establish the railroad's actual or constructive knowledge of a lead poisoning hazard (Brief in Opposition, pp. 5-6) proves the impropriety of taking the issue of the respondents' contributory negligence from the jury. Each of the circumstances cited by respondents (Brief in Opposition, pp. 5-6) is one where the respondents had the same or greater notice than the railroad of

any health hazard from lead paint. Whatever notice the railroad got of the possible existence of an under-coating of lead paint came from the respondents themselves, so that whatever proof of notice is thought to sustain the railroad's negligence should at least be considered by the jury on the issue of respondents' contributory negligence. Actually, the respondents had greater notice than the railroad. They recognized the paint as containing lead and called it "lead paint," but they did not mention it to their foreman when complaining about smoke or to their own doctors to whom they went for treatment. (See Petition, p. 31a)

The significance of this evidence under the FELA is pointed out by the dissenting opinion below (Petition, pp. 33a-34a):

> "Are not the plaintiffs then faced with the corollary propositions that, knowing of the existence of the lead paint, they also knew (by the common knowledge of laymen, as testified to by their own expert) of the danger of health from inhaling smoke and fumes therefrom; that it then became their duty to avoid exposure to such danger through the exercise of ordinary care; that it was admittedly within their power to avoid this dangerous exposure by bidding on back shop jobs to which their union seniority entitled them; and that they did not do so. I believe the situation thus presents stronger evidence of contributory negligence than the evidence of defendant's negligence which was permitted to go to the jury."

As this court observed in *Tiller* (318 U.S. 54, 65) it is the jury's function to compare the evidence of fault by the employee as well as by the employer, and "in light of the comparison, do justice to all concerned."

4. Respondents appear to concede that there was no evidence of notice to the railroad that the undercoating of paint *actually contained lead.* The evidence of notice relied

upon by respondents (Brief in Opposition, pp. 5-6) significantly fails to include any notice that there was *lead* in the base paint on the 25 year old cars which respondents were burning. The evidence of "notice" of lead relied upon by respondents amounts to nothing more than complaints about smoke or fumes or symptoms of reaction. Unlike cases where the employer knows its employees are working with hazardous substances, the material here involved is paint, with which defendant had a history of at least forty-four years of lead-free experience. Like the sand in *Urie* v. *Thompson* which *was* alleged to contain "a very high percentage of silica or silicon dioxide" of which the railroad knew or should have known, the paint here presented no hazard unless it contained lead. As held in *Urie,* the burden was on the respondents to prove the railroad's actual or constructive knowledge of the presence of the dangerous ingredient, there silica, here lead. 337 U.S. 163, 177.

We submit that certiorari should be granted and the decisions below reversed.

Respectfully submitted,

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